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David Gashler, Dean Hall, and Donna Hall v. Robert E. Peay and Janice P. Peay : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID GASHLER, DEAN HALL and DONNA HALL, Appellants, vs. ROBERT E. PEAY and JANICE P. PEAY, Appellees.	Case No. 20040948-CA

APPELLANTS' BRIEF

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
HONORABLE GARY D. STOTT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated section 78-2a-3(2)(j) (2004).

ISSUES PRESENTED & STANDARDS OF REVIEW

1. Where a landowner acquires property and uses an access roadway as a matter of right for more than twenty years, does the fact that a predecessor used the roadway by permission defeat a claim of prescriptive easement--even where the current landowner has received no such grant of permission himself or herself?

"Therefore, when we review a trial court's decision granting summary judgment, we need review only whether the trial court erred in applying the relevant law and whether a material fact was in dispute. We give the trial court's legal conclusions no deference, and instead review them for correctness." Ford v. American Exp. Financial Advisors, Inc., 98 P.3d 15, 19 (Utah 2004) (citations and quotation marks omitted). This issue was raised below at R. at 356.

2. Does the periodic closure of a roadway for routine maintenance constitute an interruption that defeats a claim for prescriptive easement?

The standard of review for summary judgment is stated above. This issue was raised below at R. at 356.

3. Did the trial court abuse its discretion in denying the plaintiffs' motion for new trial based on the new discovery that Peays did not own the roadway property at the time Mr. Peay supposedly gave permission to Mr. Smith to use the roadway?

When reviewing a trial court's denial of a motion for a new trial, the appellate court "will not reverse a trial court's decision absent [a] clear abuse of . . . discretion." State v. Harmon, 956 P.2d 262, 266 (Utah 1998). R. at 437.

STATEMENT OF THE CASE

Statement of Facts

On April 25, 1973, Dean and Donna Hall purchased the property subject of this appeal, located at 5490 North Canyon Road, Provo, Utah 84604, by way of Warranty Deed from J. Norman Smith and Myrle J. Smith. The property is the Halls' residence. (R. at 404). Dean and Donna Hall are the son-in-law and daughter of J. Norman Smith and Myrle J. Smith. (R. at 358, ¶4). The property has traditionally been accessed by a roadway running north from Provo Canyon Road to the Hall property.[1] This roadway crosses property owned by the Peays. The Peays purchased a portion of their property

[1]A second roadway access to the Hall's property exists from 5500 North, but is substandard in surfacing, grade and alignment, and is therefore not appropriate for primary access. (R. at pp. 137-138). The presence of this secondary road was not material to the decision below.

in 1969 and acquired an additional parcel in 1992. The roadway was partially located on the parcel that was acquired in 1992. (R. at 405).

The Halls utilized the primary access roadway from 1973 until August 2002, when a gate was installed by the Peays. (R. at 358, ¶8). During that time period, the Halls never received permission from the Peays, nor did they seek permission from the Peays. (R. at 281). From 1973 through 2002, the Halls continually used the road without interference, except for a few occasions when it was closed to both Halls and Peays while maintenance work was performed, including closure of the road for asphalting and slurry coating. (R. at 284). The Halls were never given any written or verbal communication that the closing of the road for maintenance was also for the purpose of cutting off the permissive use time period, nor was that the intention of the Peays. (R. at 283).

On July 31, 2002, David Gashler purchased a piece of property located at 5440 North Canyon Road, Provo, Utah 84604. In August, 2002, Mr. Peay put up a gate across the access road to prevent access to the Halls and Gashlers. (R. at 358, ¶5; R. at 357, ¶11).

On December 17, 2002, David Gashler, Dean Hall and Donna Hall filed a Verified Complaint against Robert E. Peay and Janice P. Peay alleging various claims arising out of the dispute over the access roadway. (R. at 16). On April 25, 2003, an Amended Verified Complaint was filed against Robert E. Peay and Janice P. Peay by David Gashler, Dean Hall and Donna Hall. In the Amended Verified Complaint, David Gashler, Dean Hall and Donna Hall asked for relief under several causes of action. In the First Cause of

Action, Gashler and the Halls asked to quiet title in the property. As part of the quiet title action, Gashler and the Halls alleged that use of the access was made in a fashion that had been open, notorious and without permission for the prescriptive period. Furthermore, they continued to allege that the Peays "cannot show that permission for such use was ever granted." (R. at 59, ¶¶ 40-44). On cross-motions for summary judgment, Peays claim that Mr. Peay had given permission to Norman Smith to use the road, and that the use by the Halls was likewise permissive only. In their motion, the Peays stated that they "gave Norman Smith and his family permission to cross the front part of the defendants' [Peays'] property so that Norman Smith and his family could have a more convenient access to their property than their legal access." (R. at 230, ¶ 4).

The trial court granted summary judgment in favor of the Peays, and ruled that the Peays gave Norman Smith *and his family* permission to cross the front part of the defendants' property, which would allow Norman Smith and his family a more convenient access to their property. The Court so ruled despite the fact that the Halls had no possessory interest in the subject property at the time, actual, inchoate or otherwise. The Peays "initially allowed Mr. Smith this access because of his need to park a school bus on his property." (R. at 357, ¶10). Furthermore, the court ruled that "the use of the road over the years by the plaintiffs and plaintiffs' predecessors was by permission of the defendants. The family use of the roadway was by permission and continued to be so by all of the plaintiffs to access their property." (R. at 356, ¶1). The record, however, shows

no evidence of any permission that was ever specifically given to the Halls, and the district court cited none.

On June 30, 2004, David Gashler, Dean Hall and Donna Hall filed a Motion for New Trial based on newly discovered evidence obtained subsequent to the oral arguments hearing which was held on May 11, 2004, as well as the entry of the Findings of Fact and Conclusions of Law and Judgment entered on June 17, 2004. At the time of the summary judgment hearing, the Halls were not aware of the exact location of the access roadway in relationship to the property the Peays purchased in 1992. (R. at 364, ¶ 3). The defendants did not own nor have title to the disputed roadway at the time they supposedly gave permission to the Smiths to use the roadway; rather, the Peays obtained ownership in the property in 1992. (R. at 425). The exact location of the roadway was not determined by the Halls until June 28, 2004, and was therefore not available to them at the time of the summary judgment hearing. (R. at 425). The Halls filed a motion for a new trial raising the issues of ownership over the access road, but the court denied the motion in an October 4, 2004 Order. (R. at pp. 362 and 438).

On October 29, 2004, the Halls filed their Notice of Appeal.

SUMMARY OF THE ARGUMENT

The district court erred by inferring permission by chromosome. Permission to an owner is not permission to a successor in title, and this is true even if the owner is a father and the successor is a child. Moreover, periodic closure of the roadway by the

Peays for routine maintenance did not constitute an interruption that could defeat a claim for prescriptive easement. Finally, the district court erred by denying the plaintiffs' motion for a new trial based on the newly discovered evidence that the Peays did not own the roadway property at the time Mr. Peay supposedly gave permission to Mr. Smith to use the roadway.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY RULED THAT THE PEAYS' GRANT OF PERMISSION TO SMITH CONSTITUTED PERMISSION TO HALLS.

In Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998), the Utah Supreme Court set forth the standards by which prescriptive easement claims should be adjudicated. Under the Valcarce formulation, there are two steps. First, "a party claiming a prescriptive easement must prove that his use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years. Once a claimant has shown an open and continuous use of the land under claim of right for the twenty-year prescriptive period, the use will be presumed to have been adverse." Id. at 311. Second, if the claimant in such a case has successfully shown that there was a twenty-period of use, "the owner of the servient estate then has the burden of establishing that the use was initially permissive." Id.

In granting the Peays' Motion for Summary Judgment, the district court focused on the second prong of the analysis, and ultimately concluded that Halls' use of the road

in question was permissive. Specifically, the court held that the "use of the road over the years by Plaintiff and Plaintiffs' predecessors was by permission of the Defendants. The **family use** of the roadway was by permission and continued to be so by all of the Plaintiffs to access their property." (R. at 356 ¶ 1) (emphasis added). The Court further held that the "undisputed evidence demonstrates that the use of the road was permissive and not adverse." (Id. ¶3). This conclusion, however, is unsupportable as a matter of law.

Contrary to the court's conclusion, the evidence that was before it undisputably showed that the Peays had not ever given direct permission to the Halls to use the roadway. In his deposition, Mr. Peay acknowledged that he had "never had an agreement" with the Halls regarding the road. R. at 177. Mr. Peay further stated that not only had he never had any agreement with the Halls regarding the road, but also that he had never even *discussed* the road with them at any time. R. at 177, 174. Given this testimony, it is therefore unmistakably clear that there was simply no agreement between the Peays and the Halls that would give rise to a claim of permissive use.

Given this total absence of any Peay/Hall agreement, the trial court instead determined that the use was "initially permissive" because the Peays had at one time given permission to Mrs. Hall's father to use the road. This argument fails, however, for two reasons.

First, as a matter of law, an initial grant of permissive use to one user simply does not extend to that user's heirs or assigns. In State v. Hawkins, 967 P.2d 966 (Utah Ct. App 1998), this Court held that "a license allows occupation of a property only so far as it is necessary to do the licensed act, and no further. A license must be exercised only in the manner and for the *special purpose for which consent was given*; if exercised in any other manner or if the permission given is exceeded, the license becomes a trespasser." Id. at 971(emphasis added) (citing 25 Am.Jur.2d Easements and Licenses § 139 (1996)). Further, even if an owner party has at one time given permission to another party, that initial grant of permission can be withdrawn or revoked. "[T]he fact that a use was originally permissive does not preclude a later finding of adverse use." Green v. Stansfield, 886 P.2d 117, 120 (Utah Ct. App. 1994).

Other courts have more specifically held that a license or grant of permission is only binding between the parties and expires upon the death of either party. State v. Kamp, 8 P.3d 657, 662 (Idaho App. Ct. 2000) (citing Thompson on Real Property § 60.03(a)(7)(iv), at 420-21 (David A. Thomas Ed., 1994)). A license does not pass with the title to the property but is binding between the parties expiring upon the death of either party. Rowan v. Riley, 72 P.3d 889, 896 (Idaho 2003). Further, "a license is a personal privilege to do some act or series of acts upon the land of another not involving possession of an estate or interest therein." Booker v. Cherokee Water District, 651 P.2d 452, 453 (Colo. App. 1982) (citing Lehman v. Williamson, 533 P.2d 63 (Colo. App. 1975)). "While

a bare license is revocable and thus unassignable, a license coupled with an interest is an assignable property right." Booker, 651 P.2d at 453; Schoewalter v. City of Chenev, 76 P.3d 782, 785 (Wash. App. Div. 3 2003) ("A license is revocable and non-assignable.").

Mr. Peay's own testimony indicates that although he entered into some sort of permissive agreement with Norman Smith, he did not at any time inform the Halls of this agreement, nor did he make any effort to renew it with them. As such, it simply cannot be said that the permissive use agreement that was entered into between the Peays and Norman Smith extended down to the Halls through some sort of familial bond.[2] Valcarce demands that the use be "initially permissive" in order to defeat a prescriptive easement claim. Though Norman Smith's use may have been "initially permissive," the Hall's use was not.

Second, the evidence that has been discussed above at the very least raises a material question of fact regarding the scope of the Peay/Smith permission. Though Mr. Peay did testify that the grant of permission was for Norman Smith "and his family," R. at 175, it is entirely unclear whether that initial grant of permission was intended to extend to Norman Smith's children after those children had married and Norman Smith had moved on. This confusion is created by the facts that (1) the initial grant of permission was given

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[2]This was not a case where Smith was a trustee of a family entity, or where Halls had some expectancy or inchoate interest in the property such that Smith could somehow act as their agent. But this is beside the point, since the district court would have been required to cite facts supporting such a relationship and did not.

because of Mr. Peay's strong relationship with Norman Smith, not his children (R. at 147); (2) the initial grant was further given because of the fact that Norman Smith was driving a wide school bus and needed wider access (R. at 144, p.36); and (3) the total absence of any conversation regarding the road between the Halls and the Peays. Drawing all inferences in favor of the nonmoving party, a finder of fact could examine this situation and conclude that the initial grant of permission was specific to Norman Smith, and that the subsequent use by Norman Smith's married children, after he had left, was not by extension of that initial grant. Had the Peays wanted to extend that agreement to those children, they certainly could have done so. They did not, however, thus rendering that agreement inoperative. As such, this is a question of fact that should have been reserved for trial.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE PERIODIC CLOSURE OF THE ROADWAY FOR ROUTINE MAINTENANCE CONSTITUTED AN INTERRUPTION PRECLUDING ANY CLAIM TO THE 20-YEAR PERIOD OF UNINTERRUPTED USE.

The district court stated that "the use of the roadway has been interrupted on several occasions precluding the 20-year period of uninterrupted use" for a prescriptive easement. (R. at 356, ¶ 4.) The court further held in its Findings of Fact that since purchasing the property in 1969, the Peays closed off access to their property for resurfacing and asphalting the access road on several occasions. Only one specific example of road closure was provided. In 1987 wherein the road was closed for asphalting and

resurfacing limiting all access on the road for three days. (R. 358, ¶7; 357, ¶12.). The road closures occurred for the purpose of maintaining the Peays' own personal driveway and the access road. (R. at 287). There was no evidence that the Peays closed the road for the purposes of cutting off the prescriptive easement.

The court in Griffiths v. Archibald, 272 P.2d 586, 590 (Utah 1956) stated that "if the use is against the owner's will and he interrupts or requires the user to constantly fight or scramble therefor, then the use is not peaceful and cannot create a prescriptive easement." Furthermore, courts across the country have explained what constitutes an interruption for prescriptive easement purposes. Am.Jur.2dEasements and Licenses § 69 states:

> The long-standing rules that (1) interruption is not established by posting no trespassing signs, Swift v. Kniffen, 706 P.2d 296 (Alaska 1985); (2) a material change will interrupt the prescriptive period; however, a mere change in the structural materials out of which a conduit is made does not affect the continuous running of prescription toward the acquisition of any easement or there is no indication that this works any change in the matter of volume or flow or user, Wells v. Carpenter, 916 S.W.2d 405, 407 (Mo. App. S.D. 1996); Schaunessey v. Leary, 38 N.E. 197 (Mass. 1894); and (3) an occasional detour along a portion of a way will not interrupt the running of the prescriptive period as to the original way, Walls v. Denoon, 550 S.E.2d 653, 657 (W. Va. 2001).

In this case, the periodic closures of the road were short in duration and were only for maintenance purposes. These "occasional detours" simply do not rise to the level of the type of interruption necessary to foreclose a prescriptive use. The district court should be reversed on this point.

III. THE DISTRICT COURT ERRED IN DENYING HALLS' MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE INDICATING THAT THE PEAYS DID NOT OWN THE ROADWAY AT THE TIME THE PEAYS GAVE SUPPOSED PERMISSION TO THE PREDECESSORS IN INTEREST OF THE HALLS.

In the court's Order Denying Motion for New Trial, the district court ruled that the "[p]laintiffs have failed to establish newly discovered evidence which could not, with reasonable diligence, have discovered and produced at the hearing on the Motions for Summary Judgement." (R. at 437). In the court's Findings of Fact the judge found that the (1) the plaintiffs had knowledge of a deed between the Gillespies' (prior owners) and the Peays at the time of the plaintiffs filed their Initial Disclosures; (2) that the plaintiffs could have discovered, with due diligence, the property covered by the Gillespie deed through survey or other means; and (3) that the plaintiffs could have presented the evidence at the time of the hearing on the Cross Motions for Summary Judgment. (R. at 438).

Under Rule 59 of the Utah Rules of Civil Procedure, the moving party must prove that the newly discovered evidence offered meets three specific requirements in order for a new trial to be granted. State ex rel L.M., 68 P.3d 276, 278 (Utah 2003). The first is that the offered evidence must be competent, material and in fact newly discovered. Id. Newly discovered evidence is by definition, "evidence that was not available at the start of the first trial." State v. Maestas, 63 P.3d 621, 642 (Utah 2002). The second factor is whether the evidence "could not, by due diligence, have been discovered and produced

at trial." State ex rel L.M., 68 P.3d at 278. The due diligence requirement has often been referred to as the "ordinary diligence" requirement. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174, 176 (Utah 1977). The third and final requirement is that the moving party demonstrate that the new evidence is not cumulative or incidental and that there is a reasonable likelihood that the outcome would be different with the new evidence. State ex rel L.M., 68 P.3d at 278 (Utah 2003). "[T]he moving party must show that the new evidence relates to facts were in existence at the time of trial" Id at 279

Here, the Halls sought relief based on their contentions that the Gillespie deed and the actual surveyed property was newly discovered evidence not obtained by the Halls until after the hearing on the Cross Summary Judgment Motions. (R. at 363 ¶4). At the time of the summary judgment hearings, the Halls did not know the location of the deeded property in relationship to the access roadway, and therefore did not have the discoverable evidence. (R. at 364 ¶ 3). It was not until after the summary judgment hearing that the Halls discovered that the Peays did not own the access roadway, to which they had claimed a prescriptive easement, until the property was deeded to them under the Gillespie deed. (R. at Id). According to the lower court, access was granted to the roadway in 1969 (R. at 356). The Gillespie deed, which grants a major portion of the access roadway, was not executed and recorded until 1992 (R. at 405).

At the time of trial, the Halls had no reason to suspect that the roadway was not completely acquired by the Peays until 1992. (R. at 425). For example, the Peays

presented a plot plan dated Jun 29, 2004 which highlighted a portion of access roadway. (R. at 391) Their depiction of the roadway is inaccurate and it appeared that the Peays attempted to disguise the width of the access roadway to be encompassed by the property owned by the Peays prior to the actual ownership under the Gillespie deed. (R. at pp. 424 and 391).

The Court ruled that the Halls, through due diligence or reasonable diligence, could have discovered the property covered by the under the Gillespie deed and could have presented such information at the time of the hearing. (R. at 437). The question hinges on whether the evidence was newly discoverable and whether Halls acted with due diligence or ordinary diligence in not obtaining and disseminating the property information to the Court at the proper time. Knowledge of a *deed* is ***not*** knowledge of a property *location* absent further inquiry, indeed, the hiring of an engineer or surveyor. The Halls acted with ordinary diligence in not obtaining a survey of the property prior to the hearing as prior representations (indeed, the Peays' own misleading representations) indicated that the access roadway was always owned by the Peays. Even the Court's ruling held that the Peays owned the access property since 1973. (R. at 358). To rule otherwise would be to reward the Peays for making that misrepresentation, a result not furthering substantial justice under Rule 2 of the Utah Rules of Civil Procedure.

CONCLUSION

Inferring agency from a family relationship is at the heart of the district court's error in this case. The Halls acquired their property at arms' length and were not bound by permission received by Norman Smith. Any disputes of fact or inferences that suggest otherwise should have been resolved in *the Halls'* favor, not the Peays'. The same is true for the token closures the road experienced through time. Finally, the Peays should not be rewarded for misstating their ownership of the roadway, a misstatement that deceived the Halls. The Halls were reasonable in acquiring proof otherwise, and the court should have allowed such proof to be admitted and ruled upon.

DATED this 22 day of April, 2005.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 22 day of April, 2005.

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